

Dear Mr.

This is in response to your letter on behalf of \_\_\_\_\_ which has a scuba instructor who is currently treated as nonexempt. Specifically, you are requesting an opinion concerning whether the certified scuba instructor is exempt as a teacher under the Fair Labor Standards Act (FLSA).

\_\_\_\_\_ is a nonprofit corporation whose primary goals consist of youth development, education and vocational training. It is called a "drop out prevention" program or "a youth services program." \_\_\_\_\_ is currently under contract with the \_\_\_\_\_ to provide educational opportunities to disadvantaged students participating in \_\_\_\_\_ or other youth residential or day service programs. Its curriculum is approved by the \_\_\_\_\_ County School District. All student courses conform to local and state curriculum requirements. Students earn high school credits in all classes, including those taught by the certified scuba instructor. Students simultaneously enroll in the local school district when they enter \_\_\_\_\_ and receive an official transcript from the \_\_\_\_\_ County School District listing the credits they earned at \_\_\_\_\_ upon exiting.

The scuba instructor's responsibilities and duties include the following:

1. Instructs students in diving and related courses. This includes teaching the fundamental academic aspects of scuba diving, including underwater physiology, physics, biology as related to diving, diving medicine classes; teaching related marine science oceanography, and/or outdoor sports courses in accordance with the \_\_\_\_\_ Curriculum standards in order for students to earn Carnegie units (high school credits); teaching all aspects of scuba diving in classroom and practical application environments; and testing students' knowledge and abilities through written and practical examinations.
2. Manages the diving locker and all related facilities, equipment, supplies, and training resources, and ensures that they are in compliance with all laws; teaches students how to maintain all equipment; supervises practical application training of students in diving systems maintenance, and maintains repair and maintenance of logs and inventory.
3. Supervises students during all hours of the workday, including mealtime, according to the supervision policy. Serves as advisor and positive role model; prevents and intervenes in student altercations; and administers first aid and CPR during emergencies in accordance with American Red Cross standards.

4. **Maintains accurate and complete administrative file systems. This includes maintaining records of students' progress in certification and curriculum-based classes; assisting in preparation for placement of graduates; and assisting in documentation of Carnegie units or high school credits.**
5. **Performs home visits as dictated by program standards and/or State contract.**

You further state that although the scuba instructor is not certified as a teacher under law, he or she must be certified to teach by a national certification agency (e.g., National Association of Underwater Instructors or Professional Association of Dive Instructors). The scuba instructor would be paid a salary in excess of \$250.00 per week.

Section 13(a)(1) of the FLSA provides an exemption from its monetary provisions for any employee employed in, among others, a professional capacity as this term is defined in Regulations, Part 541 (copy enclosed). The basic requirements for the professional exemption are contained in §541.3 of the Regulations and subsequent §§541.300 through 541.315 which provide the explanatory material and interpretations relating to the basic requirements of the exemption. It should be noted that the exemptions under section 13(a)(1) are not determined on the basis of job classification or occupational titles. They are determined on the basis of specific duties, responsibilities, and salary of the employee. A determination as to the exemption must be made on an individual basis and is dependent upon a detailed description of the work actually performed by the employee. The exemption would then be determined on whether the individual met all of the pertinent tests in §541.3.

For exemption as a teacher in § 541.3(a)(3) to apply, the employee must be "employed and engaged" as a teacher in the school system, educational establishment or institution by which employed (29 C.F.R. § 541.301(g)(1)). The primary duty of an employee employed as a teacher must be in the field of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge (29 C.F.R. §§ 541.3(a)(3) and 541.304(b)). The regulations recognize that teaching personnel may include teachers of skilled and semiskilled trades and occupations under certain conditions. 29 C.F.R. § 541.301(g)(2). In addition, a professional employee must consistently exercise discretion and judgment in the performance of his or her work. 29 C.F.R. §§ 541.3(b) and 541.305.

Based on the information provided, we would consider to qualify as a bona fide educational institution for purposes of the professional exemption for teachers. We base this conclusion on the fact that students earn and are granted high school credits from the county school district for all of their classes.

Based upon the description of the scuba instructor's duties contained in your letter, the employee in question appears to meet the pertinent requirements under §541.3. Therefore, it is our opinion that the scuba instructor would qualify as a teacher.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and

fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Thomas M. Markey  
Acting Administrator

Enclosure